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BILLINGS, MT

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PATRICK E. DUFFY, CLERK

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14 **IN THE UNITED STATES DISTRICT COURT**  
16 **FOR THE DISTRICT OF MONTANA**  
18 **BILLINGS DIVISION**  
19

21 UNITED STATES OF AMERICA, )  
22 )  
23 Plaintiff, )  
24 )  
25 vs. )  
26 )  
27 )  
28 CLIFFORD BIRD IN GROUND, )  
29 )  
30 Defendant. )

CR 02-49-BLG-RFC

**MEMORANDUM OF  
AUTHORITIES REGARDING  
REMAND FOR REVIEW  
OF SENTENCE**

1 NOW COMES Clifford Bird In Ground, Defendant in the above-entitled  
2  
3 case, and by his counsel Penelope S. Strong, and Paul G. Matt, and pursuant to the  
4  
5 Court's Order of September 30, 2006, and hereby submits the above-entitled  
6  
7 Memorandum of Law and Points and Authorities regarding the sentence previously  
8  
9 imposed by the Court in this matter. Counsel also has filed in support of this  
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11 Memorandum the Declaration of Attorney Penelope Strong, and various exhibits  
12  
13 thereto. It is her intent that such serve as an offer of proof in this case and for the  
14  
15 Court's consideration herein.

16 This memorandum also specifically reincorporates in this record the Pre-  
17  
18 Sentence Investigation Report and the Addendum thereto.

### 19 **FACTUAL BACKGROUND**<sup>1</sup>

20 Mr. Birdinground was formerly the chairman of the Crow Tribe, and took  
21  
22 office on July 1, 2000. Homestead Hyundai, a Billings, Montana car dealership,  
23  
24 solicited business from the Crow Tribe shortly after Mr. Birdinground took office.  
25  
26 Contrary to the Government's factual assertion in its Memorandum, Mr.  
27  
28 Birdinground himself did not personally arrange for the trade in of nine vehicles  
29  
30 owned by the Crow Tribe and one vehicle owned by the Little Big Horn Casino.  
31  
32 (Strong Declaration). Rather, according to the Defendant's debriefing, the tribe's  
buffalo manager, Ryan Bad Bear, made the arrangements after one Teri Braun, a

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<sup>1</sup> The defense, in large part, disputes the factual version of the case circumstances presented by the government in their memorandum.

1 salesperson for Homestead Hyundai and a convicted felon, solicited the business  
2 from the tribe.  
3

4 Over the next few months, Homestead-Hyundai misapplied funds from a  
5 trade-in account which it established in the name of the Crow Tribe for the  
6 vehicles it took into its physical custody. Homestead-Hyundai called this particular  
7 fund, the Crow Tribal Equity Account ( hereinafter “ CTEA”). Terri Braun heavily  
8 solicited individual Crow Tribal members to make vehicle purchases for  
9 themselves. Braun, Richard Dean Benjamin or Wayne Kimmett prepared two  
10 typewritten documents in which they misapplied funds from the CTEA to pay  
11 individual down payments of varying amounts for some of those tribal members.  
12 They submitted one of these documents to Mr. Birdinground on July 20,200, and  
13 he signed it, believing it was only a verification of the individuals’ employment  
14 with the Crow Tribe.  
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22 All of the individuals who made individual vehicle purchases were deposed  
23 by Mr. Birdinground’s former legal counsel, Attorney Vern Woodward. None of  
24 them ever said that Mr. Birdinground in any manner, promised or directed the  
25 misapplication of the CTEA funds for their individual purchases for their  
26 individual benefit. ( Strong Declaration). The Crow Tribe and its casino operation  
27 purchased many vehicles from Homestead in 2000. Salesperson Teri Braun caused  
28 to be paid to Mr. Birdinground a “ bird dog fee” of \$100 per vehicle, paid by check  
29  
30  
31  
32

1 to Mr. Birdinground, which commission fee was standard in the motor vehicle  
2 industry for sales referrals. Also, those fees, which totaled \$2700.00, were actually  
3 taken from Ms. Braun's payroll checks as a deduction. The bird dog fees were  
4 paid for both the Crow Tribe purchases, and for the individual vehicle purchases.  
5

6 Mr. Birdinground informed Attorneys Sam Painter and Majel Russell who  
7 were then working for the Crow Tribe that he had taken the "bird dog" fees. They  
8 advised him that a portion of those fees could be construed as a bribe if related to  
9 tribal governmental purchases. Mr. Birdinground repaid those fees long before he  
10 was indicted.  
11

12 Mr. Birdinground had never held tribal office previously, and numerous  
13 witnesses and governmental officials acknowledged his political naiveté and the  
14 many problems that plagued the inception of his administration. They stated that  
15 he frequently trusted other individuals to interpret written documents and  
16 conversations on his behalf, as he could not understand them without assistance.  
17 He is not a native English speaker, and at least two experts, one a professor of  
18 education specializing in literacy and reading skills, and the other a licensed  
19 psychologist, documented through testing his learning disabilities and other  
20 psychological conditions that impacted his abilities to effectively serve as  
21 chairman. In fact, his previous legal counsel filed a Notice of Intent to Assert a  
22

1 Defense of not guilty by reason of mental disease or defect, pursuant to the  
2  
3 relevant Federal rule of criminal procedure.

4 Mr. Birdinground has no previous criminal history. He has served honorably  
5  
6 in the United States military, and raised a large family on the Crow Reservation.  
7  
8 He was employed long term by the federal government, working on road  
9  
10 construction projects. He is now 70 years old.

### 11 **RELEVANT PROCEDURAL HISTORY**

12 Mr. Birdinground was first indicted on five felony counts, including  
13  
14 violations of 18 U.S.C. §661 – receiving a gratuity; 18 U.S.C. § 1163, theft from  
15  
16 an Indian Tribe, 18 U.S.C. § 371, conspiracy; 18 U.S.C. § 1168, theft from an  
17  
18 Indian Gaming Establishment, etc.

19 Eventually, he entered into a plea agreement in which he pled guilty to the  
20  
21 charge of illegally receiving a gratuity, contrary to 18 U.S.C. § 661 (a)  
22  
23 (1) (B). As consideration for his guilty plea, the government agreed to dismiss the  
24  
25 remaining counts in the indictment. Mr. Birdinground also agreed to resign his  
26  
27 chairmanship on entering his guilty plea.

28 His legal counsel who counseled him during the guilty plea, discovered a  
29  
30 conflict of interest, and Mr. Birdinground retained his present counsel of record. A  
31  
32 timely motion to withdraw his guilty plea was filed, heard and adjudicated by this  
Court. Mr. Birdinground timely appealed the Court's decision, and that decision

1 was upheld by the Ninth Circuit Court of Appeals. However, after he filed a  
2 petition for rehearing en banc, the Ninth Circuit Court of Appeals found merit in  
3 his Petition and ordered the government to file a response in the fall of 2004.  
4

5  
6 Thereafter, Mr. Birdinground's case was swept into the tidal wave of post-  
7 **Blakely** and **Booker** litigation that occurred on a widespread basis throughout this  
8 country. Finally, the Ninth Circuit Court of Appeals remanded the matter,  
9 pursuant to the **Ameline** decision to the district court so it could determine if a new  
10 sentencing hearing was required. This Court determined a new hearing was not  
11 required, stating that it believed the United States Sentencing guidelines, while  
12 now no longer mandatory, promoted uniformity in sentencing, and that it continued  
13 to give great weight to the guidelines. Order of August 9, 2005.  
14  
15

16  
17 Mr. Birdinground appealed this Court's decision not to grant him a  
18 resentencing hearing, and the Ninth Circuit Court of Appeals remanded his case so  
19 the Court could take the written views of both parties' counsel as to whether or not  
20 his case warranted a resentencing hearing. It is in this particular posture that this  
21 significant matter, which concerns the fated freedom of an elderly Crow Tribal  
22 member, comes again before this Court.  
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### 28 **ISSUE PRESENTED**

29  
30 **A. Is a Sentence Materially Different from that Originally Imposed**  
31 **Justified in this Case, when this Honorable Court Considers that**  
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1           **the U.S. Sentencing Guidelines are No Longer Mandatory, but**  
2  
3           **Rather Advisory and when it also Considers the Multiplicity of**  
4  
5           **Sentencing Factors Embodied in 18 U.S.C. § 3553 (a), as Well as**  
6           **Previously Prohibited Factors?**

7  
8                                   **ARGUMENT**

9           **1.     The Applicable Legal Standard for an Ameline/Booker Remand**  
10  
11           **Begins with an Accurate Sentencing Guidelines Computation.**

12           In United States v. Cantrell, 433 F. 3d 1269, 1279-81 (9<sup>th</sup> Cir. 2006), the  
13  
14   Ninth Circuit Court of Appeals developed a two part test for reviewing sentences  
15  
16   post- Booker. First, no longer **must** district courts sentence within an applicable  
17   guideline range. *Id.* This is because the guidelines are now simply advisory, and  
18  
19   no longer have mandatory force of law. Obviously, this creates an opportunity for  
20   a district court to accord weight to factors that previously it was totally barred from  
21  
22   considering in a federal sentencing proceeding.

23  
24           However, the Ninth Circuit Court of Appeals has stated that lower courts  
25   should continue to consult the Guidelines. *Id.* When they do, it is imperative that  
26   any guidelines computation and applications of the same be accurate. United  
27   States v. Mix, 457 F. 3d 906, 911 (9<sup>th</sup> Cir. 2006). Any misinterpretation of the  
28  
29   guidelines means a lower court has not properly consulted them, and if such is the  
30  
31   case, then the matter will be remanded for sentencing. *Id.* Application of the  
32

1 guidelines *to the facts of the case* is reviewed for abuse of discretion, and any  
2  
3 factual findings, for clear error. United States v. Smith, 424 F. 3d 992, 1015 (9<sup>th</sup> Cir.  
4 2005 ).

5  
6 The Government has asserted in its Memorandum that this Court can leave  
7  
8 undisturbed its previous guidelines calculation and companion findings. Mr.  
9 Birdinground disputes this position and hereby reincorporates all his previous  
10  
11 objections and the record relating thereto. Through counsel, he intends to set out  
12  
13 the correct guidelines computation and errors of fact and law, as well as new  
14  
15 grounds for a lesser sentence, which when they all are eventually combined, he  
16  
17 advocates, require a new sentencing proceeding.

18  
19 In addition, as the guidelines are advisory, the Ninth Circuit Court of  
20  
21 Appeals, in United States v. Knows His Gun, 438 F. 3d 913, 918 (9<sup>th</sup> Cir. 2006)  
22  
23 has stated that the primary guide for district courts in fashioning a criminal  
24  
25 sentence , post- Booker, is 18 U.S.C. § 3553 (a). These statutory factors include a  
26  
27 sentence sufficient but not greater than necessary to reflect the seriousness of the  
28  
29 offense, to promote respect for the law, to provide just punishment for the offense,  
30  
31 to afford adequate deterrence to criminal conduct, to protect the public from further  
32  
33 crimes of the Defendant, and to provide the Defendant with needed training,  
34  
35 medical care or other correctional treatment. While the sentencing court must not



1 specifically articulate each factor, there must be a showing the lower court  
2 considered these required factors in imposing sentence. Id.

3  
4 In addition, after **Booker**, federal district courts are now free to fashion  
5 sentences lesser than the guideline range based on previously prohibited factors,  
6 such as evidence of good character, community service, family responsibilities,  
7 etc. United States v. Ameline, 409 F. 3d 1073,(9<sup>th</sup> Cir. 2005. Specifically, that  
8 court stated:  
9  
10  
11

12 “ For instance, the Sentencing Guidelines’ limitations on the factors a court  
13 may consider in sentencing- e.g., the impermissible grounds for departure set  
14 forth in §5K2.0 (d)- no longer constrain the court’s discretion in fashioning a  
15 sentence within the statutory range.”

16 Mr. Birdinground, as set out in the accompanying Declaration of Attorney  
17 Strong, will and is requesting this Court to reconsider its previous sentencing order  
18 and to use the new latitude available to all district courts judges after **Booker**.  
19

20 Specifically, Mr. Birdinground respectfully asks the Court to reconsider its factual  
21 findings supporting the denial of a downward departure for aberrant behavior and  
22 submits he can meet his burden of proof to sustain such a finding.  
23  
24

25 He most respectfully submits that while a sentencing proceeding was  
26 previously held, he was not accorded a full and complete sentencing hearing as  
27 will be argued later in this Memorandum. Specifically, the district court simply  
28 adopted numerous, unproven findings from the Pre-Sentence Investigation Report  
29 and Addendum, (herein after “PSR”), without hearing any testimony or without  
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32

1 adjudicating the various factual conflicts between the information contained in the  
2  
3 PSR, and the facts presented by the Defendant's sentencing exhibits and other  
4  
5 submissions at the time of sentencing.

6 The Defendant's counsel, Penelope Strong has submitted her Declaration in  
7  
8 this matter to support these arguments and to specify the various proofs they would  
9  
10 present at a sentencing hearing. See, Declaration of Attorney Penelope Strong.

11 **2. The Higher Standard of Proof Beyond Reasonable Doubt Must Be**  
12 **Employed to Justly Sustain the Findings of Fact and Conclusions**  
13 **of Law Which Support the 14 point Enhancements that result in a**  
14 **Sentence Greater than that allowed by the Base Level offense.**

15  
16  
17 Due Process can only be fulfilled at a sentencing hearing if the parties have  
18  
19 an opportunity to develop evidence, submit memoranda, and as well to present  
20  
21 witnesses and argue their positions. United States v. Johansson, 249 F. 3d 848,  
22 857 (9<sup>th</sup> Cir. 2001). Moreover, Mr. Birdinground contends that any factual  
23  
24 findings supporting any sentencing enhancements must now be found to the greater  
25  
26 standard of proof beyond a reasonable doubt, which falls under the constitutional  
27  
28 rubric of the Fifth Amendment Due Process Clause to the United States  
29  
30 Constitution. In Re Winship, 397 U.S. 358 (1970). Further authority for this  
31  
32 position is found in Appendi v. New Jersey, 530 U.S. 466 (2000), in which the  
United States Supreme Court held that any fact which increased the maximum

1 sentence had to be proved to a jury beyond a reasonable doubt. In fact, the Court  
2 noted that the Due Process protections of In Re Winship, supra at 363-64, namely  
3 proof beyond a reasonable doubt, do extend to decisions that go only to the length  
4 of the sentence in a criminal case. Apprendi, supra at 484.  
5

6  
7 Thus, even if this standard is employed by a judge and not a jury, a proper  
8 evidentiary hearing must be held for full and fair adjudication of this heightened  
9 evidentiary standard. See also, Ring v. Arizona, 536 U.S. 584 (2002), in which the  
10 United States Supreme Court held that increase in a defendant's authorized  
11 punishment must be found by a jury beyond a reasonable doubt. As the United  
12 States Supreme Court stated in In Re Winship, supra, 363 "the reasonable doubt  
13 standard is the prime instrument for reducing the risk of convictions resting on  
14 factual error."  
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20  
21 Mr. Birdinground's base level offense was ten points - the court made  
22 findings totaling another 14 points based primarily on the PSR, not on any fact  
23 found by a jury or admitted by the Defendant at his sentencing, except for  
24 accepting the gratuities while he was chairman of the Crow Tribe.  
25  
26

27 At a level ten, this individual would fall into zone B and thus would be  
28 eligible pursuant to U.S.S.G. §5B1.1 (a)(2) for a probationary sentence, combined  
29 with a sentence of home detention, community confinement, etc. Mr.  
30  
31  
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1 Birdinground's attorneys submit this is the most fitting and just sentence for him,  
2  
3 and is one which synthesizes all the relevant factors of 18 U.S.C. §3553.

4 Certainly, a criminal defendant in our federal system facing sentencing  
5  
6 enhancements that drive his or her sentence above and beyond the standard  
7  
8 guideline range are likewise entitled to the full, just and comprehensive application  
9  
10 of proof beyond a reasonable doubt. In this situation, only the reconvening of an  
11  
12 evidentiary hearing for sentencing purposes can fulfill that right.

13 In the alternative, it is argued that the current standard of clear and  
14  
15 convincing evidence; See, United States v. Jordan, 256 F. 3d 922, 927-8 (9<sup>th</sup> Cir.  
16  
17 2001); cannot be met on the current record of the sentencing hearing. Moreover,  
18  
19 the PSR, and the Court relied on evidence that the defense submits is not reliable.  
20  
21 Even if the Court does not adopt the standard of proof beyond a reasonable doubt,  
22  
23 it must reconvene a new sentencing hearing in this matter. Pursuant to the binding  
24  
25 precedent of Jordan, supra, any sentencing enhancement that has a disproportionate  
26  
27 impact on the length of a sentence must be proven by clear and convincing  
28  
29 evidence.

30 **3. Mr. Birdinground's Sentence Must be Recomputed, to Avoid**  
31 **Error and a Miscarriage of Justice, and a New Sentencing**  
32 **Hearing Must be Held.**

1 Without obtaining the views of counsel, at least in writing, this Court on  
2 August 9, 2005, determined that resentencing Birdinground was unwarranted as  
3 the sentence would not materially differ under the current advisory guideline  
4 regime. (Order, August 9, 2005, p. 2). The Court based its decision on its  
5 continued position to give great weight to the Sentencing Guidelines. Id. The  
6 Ninth Circuit has stated the Sentencing Guidelines are now only advisory and one  
7 factor to be considered under Section 3553(a). See, Cantrell, supra at 1278.  
8  
9

10  
11  
12 At Birdinground's sentencing on September 11, 2003, the Court viewed the  
13 Sentencing Guidelines as mandatory. The Court summarily denied Birdinground's  
14 counsel an opportunity to argue its objections to the pre-sentence investigation  
15 report and have the Court receive a response of the Government. Instead, the  
16 Court adopted the pre-sentence investigation report's findings of facts and adopted  
17 verbatim the addendum to the pre-sentence report responding to Birdinground's  
18 objections. (Sentencing Hearing, September 11, 2003, pp. 5-11). Using the  
19 findings of the addendum to the pre-sentence investigation report, the Court  
20 increased Birdinground's base offense level 14 points. The Court, by adopting the  
21 Addendum found it was "reasonably foreseeable" Birdinground knew or  
22 understood his actions meriting upward departures were criminal. Mr.  
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1 Birdinground disputes this particular finding, and contends it has no factual or  
2  
3 legal basis in this case.<sup>2</sup>

4 The legislatively established process for sentencing pursuant to Fed. Rule of  
5  
6 Crim. Pro. 32 is:

- 7 1. the probation officer's recommendation contained in the PSR;
- 8 2. the defendant's opportunity to submit objections thereto;
- 9 3. the satisfactory resolution by the Court of any facts adduced to  
10 support the various criminal acts that would lead to particular findings  
11 under the U. S. Sentencing Guidelines to allow the judge to impose a  
12 harsher sentence.  
13  
14  
15  
16

17 The opportunity to object is hollow if the Court denies the defendant the  
18  
19 opportunity to argue against the pre-sentence investigation allegations and present  
20 evidence. At Birdinground's September 11, 2003, sentencing he presented the  
21 Court with 17 exhibits demonstrating the faulty conclusions of facts found in the  
22 PSR and Addendum. The Court admitted the exhibits but denied the Defendant a  
23 hearing because it believed that much of the Defendant's objections were directed  
24 to a defense of the case.  
25  
26  
27

28 "THE COURT: And I'm going to admit the defendant's exhibits 1  
29 through 17 for the purpose of this record for appeal and would note  
30 that at least one of the reasons that I don't need a hearing, I think  
31

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32 <sup>2</sup> A standard of reasonable foreseeability is more akin to a tort standard of liability, i.e. that of negligence, as opposed to the specific mens rea required for most criminal offenses.

1 much of this is directed to a defense of the case, and I've already  
2 accepted Mr. Birdinground's plea of guilty, and in my mind at this  
3 time it's irrelevant." (at p. 6, lines 12-18).

4 Respectfully, the court erred in making this assessment of the  
5  
6 relevance of this evidence. Many upward guideline adjustments are typically  
7  
8 based on the criminal conduct at issue and on relevant conduct. Defense  
9  
10 counsel are duty bound then, to defend the case, and those particular  
11 findings, to avoid a harsher sentence for their clients.

12 Defendant's exhibits and arguments were submitted to inform the Court of  
13  
14 the exact nature and circumstances of the offense Birdinground pled guilty to and  
15  
16 to the substantial allegations of relevant conduct alleged in the PSR. District  
17  
18 courts are obligated to consider, in addition to the sentencing guidelines, all factors  
19  
20 enumerated in 18 U.S.C. § 3553(a), including: (1) the nature and circumstances of  
21  
22 the offense and a history of the defendant. The nature of Birdinground's offense is  
23  
24 that he pled guilty to a charge of receiving a gratuity in violation of 18 U.S.C., §  
25  
26 666. The circumstances of the offense are that salesperson Terry Braun gave  
27  
28 Birdinground the bird dog fees so that she could claim the commission from the  
29  
30 sale of vehicles to the Crow Tribe or individuals. Mr. Birdinground disputes that  
31  
32 she paid the bird dog fees for the purpose of influencing him as Tribal Chairman.  
Consequently, another sentencing hearing is necessary for this Court to reconsider  
its factual findings, adopted from the PSR and the Addendum.

1 This Court enhanced Birdinground's sentence by 14 points based on the  
2 information and recommendations of the pre-sentence investigation report and  
3 addendum. (September 11, 2003, Transcript, pp. 15-17). Those enhancements  
4 were based on the following findings:  
5

- 6 1. 2-Level increase because the offense involved more than one bribe.  
7 (2 C1.1(b)(1).  
8
- 9 2. 8-Level increase pursuant to U.S.S.G. § 2C1.1 (b) ( 2 ) ( B ) because  
10 he was elected Crow Tribal Chairman and the offense involved the  
11 payment for the purpose of influencing an elected official or any  
12 official holding a high-level, decision-making or sensitive position.  
13
- 14 3. 2-Level increase because he was an organizer, leader, manager, or  
15 supervisor in the criminal activity. (2B1.1(c)).  
16
- 17 4. 2-Level increase because he willfully obstructed or impeded or  
18 attempted to obstruct or impede the administration of justice during  
19 the course of the investigation.  
20

21 Each of these upward adjustments involves separate criminal conduct or  
22 Birdinground's position with respect to criminal conduct that he did not admit to.  
23 For each of these allegations, Birdinground is both presumptively innocent and has  
24 a right against self-incrimination. Mitchell v. United States, 525 U.S. 314 (1999);  
25 United States v. Antelope, No. 03-30334 (9<sup>th</sup> Cir. June 27, 2005). Birdinground  
26



1 has not admitted to the criminal conduct of being influenced in his position as  
2 Chairman of Crow Tribe or criminal conduct of being the leader of a criminal  
3 investigation or obstruction of justice. Furthermore, the Court convicting  
4 Birdinground of criminal conduct meriting an upward adjustment based on a  
5 “reasonably foreseeable” standard is contrary to established law.  
6  
7  
8

9 The Court concluded Birdinground should receive a two level increase as an  
10 organizer in a criminal activity because he signed the allocation of CTEA funds for  
11 tribal individuals who purchased personal vehicles. (September 11, 2003, hearing,  
12 p. 16, lines 10-15). The Court’s factual findings supporting that adjustment for  
13 Birdinground signing the CTEA allocation is found in the probation officer’s  
14 response to objection No. 1;  
15  
16  
17  
18

19 “It is reasonably foreseeable that the defendant, who was assisted by  
20 Mr. Benjamin, understood the agreements of which he was signing in  
21 the letters described in paragraph 16 through 18.”  
22

23 This is disputed by the defense and is contrary to the factual contentions and  
24 proffers of the Defense. See Declaration of Attorney Strong.  
25

26 In addition, the Court concluded Birdinground should receive an 8-Level  
27 increase because he was the elected Tribal Chairman and the offense involved  
28 payments for the purpose of influencing an elected official. (September 11, 2003,  
29 hearing, p. 16, lines 1-9). This demonstrates the Court’s need to consider the  
30 circumstances of the offense to which Birdinground had pled.  
31  
32

1       The bird dog fees were paid to Birdinground by Homestead Hyundai  
2  
3       salesperson Terry Braun so that she would be listed as the commission salesperson  
4       for each vehicle sold to the Crow Tribe or individual. Birdinground will present at  
5  
6       a sentencing hearing evidence and possibly the testimony of former salesperson  
7  
8       Terry Braun to inform the Court of these circumstances. There was no influence  
9       exerted by the payment of those fees; they were solely for the purpose of Terry  
10  
11       Braun claiming the commissions of all the vehicles sold to the Crow Tribe or Crow  
12  
13       individuals.

14       The Court further found Birdinground received a two level increase because  
15  
16       he willfully obstructed or attempted to obstruct justice during the course of the  
17  
18       investigation regarding tribal contracts by falsifying documentation to make tribal  
19       contracts appear legitimate. (September 11, 2003, hearing, p. 16, lines 17-25).  
20  
21       The Court's support of this enhancement is found in the probation officer's  
22       response to objection No. 8:

23  
24       "It is reasonably foreseeable that the Defendant knew the contracts  
25       were falsified because he suggested the inflation of the contract to  
26       Passes."

27       Again the defense objects to this erroneous standard of proof and this  
28  
29       finding, for the reasons previously noted.

30       The Ninth Circuit Court of Appeals has stated that when a district court  
31  
32       reviews a past sentencing decision pursuant to a remand under Ameline, that the

1 respective arguments of counsel may assist to train the court's analysis on  
2 overlooked facts that may be relevant under 18 U.S.C. § 3553 ( a). United States v.  
3 Montgomery, No. 05-10587, page 10437).

4  
5  
6 **5. A New Sentencing Hearing Will Serve Justice in This Case and**  
7 **Accord the Court an Opportunity to apply the New Standards of**  
8 **Law.**  
9

10  
11 The Ninth Circuit Court of Appeals has continued to emphasize the sea  
12 change wrought in federal sentencing law and practices since the decision in  
13 Booker. It has stated that under the now advisory guidelines, the district court can  
14 in every case consider factors that were either discouraged or outright prohibited  
15 before the Booker decision. Montgomery, supra at 10437. As noted in Attorney  
16 Strong's Declaration, this is the request of Mr. Birdinground in his case.  
17

18  
19  
20 First he would point out that the victim in this case, the people of the Crow  
21 Tribe, have not advocated for the prison term continually advanced by the United  
22 States government. While the government paints a very dark and even sinister  
23 picture of the former Birdinground administration as corrupt<sup>3</sup>, interestingly no  
24 members of the Crow Nation or its government have submitted victim impact  
25 statements or stepped forward to demand a prison term for this elderly defendant.  
26  
27 Certainly, it is universally understood in our criminal justice system that the  
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29  
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32

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<sup>3</sup> Counsel disputes this conclusory view of the former Birdinground administration.

1 victims of any criminal offense are entitled to have their views credited, and taken  
2  
3 into account in sentencing a defendant, especially any need in their opinions for  
4 incarceration.

5  
6 To the contrary, many tribal members submitted letters on Mr.  
7 Birdinground's behalf and one tribal elder testified in his support at his sentencing  
8 hearing, emphasizing changes he made during his administration that benefited  
9 Crow Elders, as well as the massive change in Crow tribal government, including  
10 enacting a new constitution and a legislative system. The government has  
11 complained mightily in the past about the institutional deficits in the Crow Tribal  
12 governmental system of "town hall democracy", so it is unfair to fail to credit Mr.  
13 Birdinground with this substantial change that probably will provide a more just  
14 and open system of government for the Crow Tribe.

15  
16 Both the Court and the government state the federal sentencing guideline  
17 system brings uniformity to federal cases. However, counsel would note that in  
18 another recent case, involving a former top- ranking Enron executive, one Richard  
19 Causey, a prison sentence of five and a half years was imposed in federal court in  
20 Houston, Texas for a national scandal that involved millions of dollars.  
21 (See article from the *Billings Gazette*, 11/16/06, attached as Exhibit A hereto). Mr.  
22 Birdinground has been sentenced to over three years for accepting and then  
23 returning \$28 hundred in bird dog fees.

1 Finally, counsel would point out the comments of United States Supreme  
2 Court Justice Anthony Kennedy, on August 9, 2003, in which he took our federal  
3 criminal justice system to task for our extremely high level of incarceration. He  
4 also stated pointedly that the legislative compromise that led to the enactment of  
5 the federal sentencing guidelines has led to an increase overall in the length of  
6 prison terms issued pursuant to those guidelines. As stated in his pivotal address to  
7 the American Bar Association in San Francisco on August 9, 2003:  
8  
9  
10  
11

12 **“...our punishments are too severe, our sentences too long.....We should**  
13 **revisit this compromise. The Federal Sentencing guidelines should be**  
14 **revised downward.”**  
15  
16

17 Once again then, the halcyon principles of 18 U.S. C. § 3553 ( a ), that now  
18 are the primary guide for a federal sentence must be reviewed, and wisely applied  
19 to the particular circumstances of this case. As for the characteristics of this man,  
20 the defense submits that this defendant will never again reoffend, thus the need for  
21 specific deterrence is negligible in this case. As for general deterrence, the Crow  
22 Tribe is heavily investigated and scrutinized by ever vigilant federal investigators,  
23 and while deterrence is important, counsel submits that a prison term for Mr.  
24 Birdinground is unnecessary to fulfill that important purpose, or likewise, to  
25 promote respect for the law. This defendant timely pled guilty, attempted to  
26 cooperate with the government, and has never stated he did not respect the law.  
27  
28  
29  
30  
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32

1 Further, as to the nature and circumstances of the offense, the Court should  
2  
3 remember this is not a crime of violence, where incapacitation is essential to  
4  
5 protect the public and the victim from future harm. Neither is it the handiwork of a  
6  
7 sophisticated and corrupt politician, who has considerable experience in political  
8  
9 life and in skirting the limits of the law. Rather, a fair and just analysis of this  
10  
11 offense reveals it was not initiated by Mr. Birdinground, the payments were open  
12  
13 and above board, and not “under the table “ cash. (Mr. Birdinground was paid by  
14  
15 check for the bird dog fees). The fees were paid so Terry Braun would receive 28  
16  
17 commission checks. The gratuities was repaid promptly by this Defendant when  
18  
19 his legal counsel advised him of the potential illegality of those payments, a  
20  
21 substantial fact which proves not only his good faith, but as well his ability to  
22  
23 receive competent legal advice and act on it. Finally the entire tragic scenario in  
24  
25 this case, when put in proper perspective, reveals a situation in which a markedly  
26  
27 naïve and unsophisticated individual attained the highest office possible in his  
28  
29 tribe, and simply could not function at the demanding level necessary to effectively  
30  
31 function in that office, and control the behavior of others employed by him, and  
32  
those outsiders who aggressively solicited the business of the Crow Tribe.

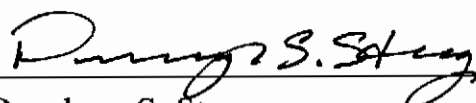
As a final note, and plea for justice, counsel again refer back to the words of  
Justice Kennedy, who noted in that same keynote speech this wise observation:

1           **“A people confident in its laws and instructions should not be ashamed**  
2  
3           **of mercy. The greatest of poets reminds us that mercy “ is mightiest in**  
4           **the mightiest”.**

5  
6           Counsel for Mr. Birdinground have absolutely no compunction in  
7  
8           advocating for another sentencing hearing in this case, and will, at that time, argue  
9  
10          for a sentence at a level ten under the guidelines. No more punishment is required  
11          to serve the interests of the victim, the defendant, and our government, in this case.  
12  
13          Home confinement or community confinement and a probationary sentence will  
14          adequately serve the goals to be achieved in this case.

15  
16                               Dated this 18~~th~~ day of November, 2006.


17   RESPECTFULLY SUBMITTED:

18  
19  
20     
21   \_\_\_\_\_  
22   Penelope S. Strong

1  
2  
3 **CERTIFICATE OF SERVICE**

4 On November 20<sup>th</sup>, 2006, I mailed via first class mail the above-entitled  
5  
6 document to :

7  
8 Carl Rostad  
9 Assistant U. S. Attorney  
10 PO Box 1478  
11 Billings, MT 59103  
12

13   
14 \_\_\_\_\_  
15 Paul G. Matt  
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10A Thursday, November 16, 2006

## Ex-Enron exec gets 5 1/2-year sentence

HOUSTON (AP) — Richard Causey, the last of the top Enron Corp. executives to learn his punishment, was sentenced Wednesday to 5 1/2 years in prison for his role in one of the biggest corporate scandals in U.S. history.

Causey, the energy trading company's former chief accounting officer, pleaded guilty in December to securities fraud two weeks before he was to be tried along with Enron founder Kenneth Lay and former chief executive Jeffrey Skilling on conspiracy, fraud and other charges.

"There were improper things done at Enron. Some of those things were done by me. For that, I'm sorry," Causey said before U.S. District Judge Sim Lake sentenced him. "As God is my wit-

ness, I never did anything intentionally to enrich myself or hurt the company or its employees."

After Causey, 46, serves his five years, six months in prison, he will have to serve two years' probation and pay a \$25,000 fine that will be distributed to Enron's victims. Causey had already agreed to pay \$1.25 million to the victims' funds and forfeited a claim to about \$250,000 in deferred compensation.

The maximum penalty for securities fraud is 10 years in prison and a fine of \$1 million or twice the amount illegally gained.

Causey's sentencing came less than a month after ex-CEO Skilling was sentenced to more than 24 years in prison. It also came a week after Andrew Fastow, Enron's former chief financial officer, was sentenced to six years. Fastow had testified against Skilling and Lay, who were convicted in May of conspiracy and fraud. Lay's convictions were wiped out with his July death from heart disease.



CAUSEY